STATE OF MICHIGAN

COURT OF APPEALS

MARK ROZENBERG,

Plaintiff-Appellant,

v

RETRIEVAL METHODS, INC., a Pennsylvania Corporation, EDWARD GIEBEL, and JOHN KRAVETZ,

Defendants-Appellees,

and

RETRIEVAL METHODS, INC., a Michigan Corporation, and STANLEY RAY,

Defendants.

UNPUBLISHED
April 11, 2006

No. 259217
Oakland Circuit Court
LC No. 99-013786-CK

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order awarding him damages, based on a stipulation, from defendants-appellees, but reduced by a credit or setoff from a contemporaneous settlement. We affirm. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

Plaintiff was instrumental in securing for what he thought was a single corporate entity, Retrieval Methods, Inc., a large contract from K-Mart Corporation. Plaintiff and defendant Giebel memorialized an agreement according to which Retrieval Methods, Inc., would pay plaintiff, "in compensation for his efforts to secure business at Kmart . . . 10% of gross revenue or 30% of gross profits, whichever amount is greater." Plaintiff received commissions under the ten percent formula for approximately two years, but they were discontinued in April 1997.

Plaintiff filed suit for payment of commissions stemming from continued business between K-Mart and Retrieval Methods, Inc. Defendants-appellees Giebel and Kravetz maintained that there was in fact a distinction between their company, Retrieval Methods of Pennsylvania, and one owned by defendant Stanley Ray, Retrieval Methods of Michigan. Their

position was that their Pennsylvania corporation performed the K-Mart contract initially, but that the Michigan one took over that business in 1997.

Earlier proceedings resulted in a judgment of $9,588.67 in plaintiff's favor against Retrieval Methods of Pennsylvania, and dismissal of Retrieval Methods of Michigan. On appeal, we affirmed the judgment, but reversed the dismissal. *Rozenberg v Retrieval Methods, Inc*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2002 (Docket No. 225586), slip op at 2.

After remand, but just before trial, plaintiff, Ray, and Retrieval Methods of Michigan settled for $70,000. The proceedings thereafter thus concerned commissions that plaintiff allegedly earned after November 13, 1997. The remaining parties stipulated that "the K-Mart gross sales after November 1997 to Retrieval Methods of Michigan, Inc. were $750,000.00." At issue was whether there was sufficient identity between the respective Michigan and Pennsylvania entities, and their operators, that plaintiff could enforce his agreement executed with the latter against the former.

The jury returned a verdict in plaintiff's favor, concluding that the corporate entity contracting with plaintiff was in fact an apparent partnership. Plaintiff sought a judgment in the amount of $75,000, as his ten-percent share of the income to which the parties had stipulated, but defendants-appellees requested that that amount be credited by the $70,000 that plaintiff had received from the other defendants.

The trial court initially suggested that defendants'-appellees' entitlement to such a setoff depended on their having broached the subject earlier in the proceedings. Defense counsel admitted that the transcripts showed no such thing, but implied that he had made the claim in chambers. The trial court eventually agreed, stating, "Well, I thought he did," and decided to allow the setoff.

The sole issue in this appeal is whether the trial court erred in reducing defendants'-appellees' present obligation by the amount of the earlier settlement. A trial court's factual findings are reviewed for clear error, while its application of the law to the facts is reviewed de novo. *Schroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997). At issue is whether the parties' stipulation absolutely determined the extent of defendants'-appellees' liabilities wholly apart from plaintiff's earlier settlement with defendants Ray and Retrieval Methods of Michigan. We conclude that it did not.

Plaintiff, in both his complaint and his amended complaint, asserted that all defendants were involved in a joint enterprise, and thus were all obliged to honor his contract. We substantially credited this position in the earlier appeal, concluding that plaintiff had offered evidence to show that there was substantial identity between all operations and operators. *Rozenberg, supra*, slip op at 2-3. The jury then fully vindicated plaintiff's position, concluding that the various defendants operated as a partnership. Having prevailed at trial by treating the two businesses entities as one, plaintiff should not be able to improve his position on appeal on the ground they are wholly separate.

Plaintiff's characterization of the parties' stipulation, concerning how much income K-Mart had generated for the Michigan entity after November 1997, as establishing liability as a

sum certain, indicates that he recognizes the Michigan incarnation of defendant businesses as the only one generating revenues from K-Mart for the period over which trial was held. Plaintiff thus at once asserts an entitlement to commissions engendered by the operations of Retrieval Methods of Michigan, and recognizes that such commissions are to be calculated on the basis of its specific income for the period in question, yet wishes not to have a settlement reached with Retrieval Methods of Michigan and its operator factor into that result.

"As a general rule, a plaintiff may pursue separate judgments against defendants that are jointly and severally liable for the plaintiff's damages, but the plaintiff may recover only one satisfaction for the losses." *Hanley v Mazda Motor Corp*, 239 Mich App 596, 601; 609 NW2d 203 (2000). The fact that plaintiff sought damages based on a stipulated amount of income, earned entirely by the Michigan entity, while separately retaining a settlement tendered by that same entity, establishes that plaintiff seeks a duplicative recovery.

Plaintiff protests that defendants-appellees waived any right to a setoff for having failed to assert such an entitlement as an affirmative defense in their pleadings. We disagree. MCR 2.111(F)(3)(a) sets forth payment and satisfaction as among affirmative defenses that must be set forth in a written responsive pleading. But plaintiff did not reach his settlement with the Michigan defendants until two days before trial. The trial court effectively allowed defendants-appellees to amend their pleadings to present the setoff defense.

A trial court has wide discretion concerning the amendment of pleadings. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). In this case, that the settlement existed was obviously a matter before the court and remaining parties, and plaintiff's attorney should not have been surprised that the assertion would arise that the amount of the settlement would reduce plaintiff's entitlement to any additional damages. The spirit of the procedural requirements for affirmative defenses was satisfied by defense counsel's having made the claim of the setoff application in chambers, as the trial court recollected, and having filed written objections to plaintiff's motion for entry of judgment on the basis of that setoff. The trial court did not abuse its discretion in allowing defendants-appellees to assert the setoff as they did.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald S. Owens
/s/ Pat M. Donofrio